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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,
Defendant.

Case No. 3:21-cv-03496-AMO

**DECLARATION OF PAUL D.
BRACHMAN IN SUPPORT OF
DEFENDANT'S BILL OF COSTS**

The Honorable Araceli Martínez-Olguín

1 I, PAUL D. BRACHMAN, declare as follows:

2 1. I am an attorney licensed to practice in New York and the District of Columbia,
3 and am admitted *pro hac vice* to practice before this Court. I am a partner with the law firm of
4 Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul, Weiss”), counsel for Defendant Intuitive
5 Surgical, Inc. (“Intuitive”) in this matter. I have personal knowledge of the facts set forth herein,
6 and if called to testify, I could and would testify competently hereto.

7 2. I submit this Declaration in support of Intuitive’s application for costs incurred in
8 this action in the amount of **\$524,938.57**.

9 3. On January 30, 2025, the Court entered judgment pursuant to Federal Rule of
10 Civil Procedure 54(b) in Intuitive’s favor and against Plaintiff Surgical Instrument Service
11 Company, Inc. (“SIS”) on all remaining claims pending against Intuitive. Dkt. 462. As the
12 prevailing party as to those claims, Intuitive seeks to recover its costs pursuant to Federal Rule of
13 Civil Procedure 54(d)(1), as reflected in Intuitive’s Bill of Costs and supporting Exhibits,¹ and as
14 further explained below.

15 **Trial Transcript Costs**

16 4. Pursuant to Civil Local Rule 54-3(b)(1), “[t]he cost of transcripts necessarily
17 obtained for an appeal is allowable.” Intuitive seeks to recover **\$14,621.58** in costs incurred to
18 obtain trial transcripts in this matter. This amount does not include the costs of Realtime, which
19 Intuitive does not seek to recover. Attached hereto as **Exhibit 1** is a true and correct copy of an
20 invoice reflecting Intuitive’s costs incurred to obtain trial transcripts in this matter.

21 **Deposition Costs**

22 5. Pursuant to Civil Local Rule 54-3(c)(1), “[t]he cost of an original and one copy of
23 any deposition (including videotaped depositions) taken for any purpose in connection with the
24 case is allowable.”² Additionally, pursuant to Civil Local Rule 54-3(c)(3), “[t]he cost of

25 ¹ Pursuant to Federal Rule of Civil Procedure 5.2, redactions have been applied to the exhibits
26 to remove taxpayer identification numbers and financial account numbers.

27 ² Section I.A.4 of the parties’ Joint Stipulation and Order Regarding Deposition Protocol, Dkt.
28 95, provides that depositions taken in *Restore Robotics LLC v. Intuitive Surgical, Inc.*, No.
5:19-cv-55-TKW-MJF (N.D. Fla.) (the “*Restore* action”) or *Rebotix Repair LLC v. Intuitive*
Surgical, Inc., No. 8:20-cv-02274-VMC-TGW (M.D. Fla.) (the “*Rebotix* action”), may be

reproducing exhibits to depositions is allowable if the cost of the deposition is allowable.”

Intuitive seeks to recover **\$200,311.20** in costs incurred to obtain deposition transcripts and video recordings, and **\$6,921.35** in costs incurred to reproduce deposition exhibits. Intuitive seeks to recover costs associated with the depositions taken in this case, and to recover the costs associated with a subset of depositions taken in the *Restore* and *Rebotix* actions of witnesses who were listed on the parties’ trial witness lists in this matter, *see* Dkt. 278-3.³ True and correct copies of the invoices supporting those costs are as attached as **Exhibit 2**. Attached hereto as **Appendix A** is a chart identifying the line items from each deposition invoice for which Intuitive seeks to recover costs. To the extent Intuitive seeks to recover only a discounted portion of a specific line item, that information is noted in footnotes to **Appendix A**. Intuitive does not seek to recover costs excluded by Civil Local Rule 54-3(c).

Document Discovery Costs

6. Pursuant to Civil Local Rule 54-3(d)(2), “[t]he cost of reproducing disclosure or formal discovery documents when used for any purpose in the case is allowable.” Intuitive seeks to recover **\$38,665.00** in costs related to the production of formal discovery documents. These costs include the costs of processing documents for production in this action and the cost of processing documents for production in the *Restore* and *Rebotix* actions, to the extent that those documents were reproduced or treated as reproduced in this case.⁴ Intuitive does not seek to recover costs incurred in reviewing documents for production. Attached hereto as **Exhibit 8** are

used as if they were taken in this matter. Attached hereto as **Exhibit 3** is a true and correct copy of the parties’ Joint Stipulation and Order Regarding Deposition Protocol, Dkt. 95.

³ Attached hereto as **Exhibit 4** is a true and correct copy of the parties’ trial witness lists, Dkt. 278-3.

⁴ Attached hereto as **Exhibit 5** is a true and correct copy of the Stipulated ESI Order in this matter, Dkt. 86, which contains the processing specifications for documents produced in this case, and specifies in Section 7 that any documents produced “in this litigation that originally were produced or processed as part of a response to a government investigation or discovery request in” the *Restore* or *Rebotix* actions “may be produced in a manner and form consistent with how the Documents were originally produced or processed.” Attached hereto as **Exhibit 6** is a true and correct copy of the Agreed Protocol for Production of Hard-Copy Documents and Electronically Stored Information in the *Restore* action, which was filed at ECF No. 35 in that action. Attached hereto as **Exhibit 7** is a true and correct copy of the Agreed Protocol for Production of Hard-Copy Documents and Electronically Stored Information in the *Rebotix* action, which was executed by the parties in the *Rebotix* action.

1 true and correct copies of billing entries of Consilio LLC (formerly, Legility LLC) reflecting
2 costs incurred for reproducing formal discovery documents.

3 **Trial Exhibit Costs**

4 7. Pursuant to Civil Local Rule 54-3(d)(4), “[t]he cost of reproducing trial exhibits is
5 allowable to the extent that a Judge requires copies to be provided.” Section VIII.C of the
6 Court’s Schedule and Pretrial Order, Dkt. 235, required the parties to “jointly prepare a single set
7 of all trial exhibits” for delivery to the Court.⁵ Intuitive seeks to recover costs of **\$10,905.95**
8 incurred in reproducing trial exhibits pursuant to the Court’s order. Attached hereto as **Exhibit**
9 **10** is a true and correct copy of an invoice reflecting these costs.

10 **Visual Aid Costs**

11 8. Pursuant to Civil Local Rule 54-3(d)(5), “[t]he cost of preparing charts, diagrams,
12 videotapes, and other visual aids to be used as exhibits is allowable if such exhibits are
13 reasonably necessary to assist the jury or the Court in understanding the issues at the trial.”

14 9. Intuitive seeks to recover **\$248,868.25** in costs incurred in preparing charts,
15 diagrams, and other visual aids that were used as demonstrative exhibits for the purpose of
16 assisting the jury and the Court in understanding the issues at trial.

17 10. Attached hereto as **Exhibit 11** are true and correct copies of invoices from Impact
18 Trial Consulting LLC (“Impact”) reflecting costs incurred by Intuitive in the amount of
19 \$211,261.25. Intuitive has excluded from the invoices included in **Exhibit 11**, and is not seeking
20 to recover, certain categories of costs, including (among other things) costs associated with the
21 preparation of videotapes used at trial and costs associated with the presentation of visual aids
22 during trial (*i.e.*, “hot seater” time). Although Impact professionals in some instances worked
23 more than eight hours per day preparing for and during trial, Intuitive seeks to recover costs
24 associated with no more than eight hours of work time per day, per Impact professional. Time
25 entries reflected on **Exhibit 11** have accordingly been limited to no more than eight hours.

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27
28 ⁵ Attached hereto as **Exhibit 9** is a true and correct copy of the Court’s Schedule and Pretrial
Order, Dkt. 235.

1 11. Attached hereto as **Exhibit 12** are true and correct copies of invoices from
2 Fulcrum Legal Graphics reflecting costs associated with preparing visual aids that were used as
3 demonstrative exhibits in the amount of \$37,607.

4 **Witness Fees/Expenses**

5 12. Pursuant to Civil Local Rule 54-3(e), “[p]er diem, subsistence, and mileage
6 payments for witnesses are allowable to the extent reasonably necessary and provided for by 28
7 U.S.C. § 1821.” Pursuant 28 U.S.C. § 1821, “[a] witness shall be paid an attendance fee of \$40
8 per day for each day’s attendance [at any court of the United States]. A witness shall also be
9 paid the attendance fee for the time necessarily occupied in going to and returning from the place
10 of attendance at the beginning and end of such attendance or at any time during such
11 attendance.”

12 13. Intuitive called five live witnesses to testify during trial in this matter: David
13 Rosa, Dr. Myriam Curet, Dr. Maxwell Meng, Grant Duque, and Dr. Loren Smith. Intuitive seeks
14 to recover **\$4,645.24** in witness fees and expenses: \$600 in attendance fees and \$4,045.24 in
15 costs incurred in connection with the testimony of these witnesses.

16 14. Attached hereto as **Exhibit 13** is a true and correct copy of an invoice reflecting
17 subsistence costs, specifically lodging costs, incurred for witness David Rosa for the night before
18 the first trial day on which he was reasonably anticipated to testify through the last day he
19 testified (1/20/2025–1/23/2025). **Exhibit 13** reflects costs for this time period totaling \$936.85.

20 15. Attached hereto as **Exhibit 14** is a true and correct copy of an invoice reflecting
21 subsistence costs, specifically lodging costs, incurred for witness Dr. Myriam Curet for the night
22 before the first trial day on which she was reasonably anticipated to testify through the day she
23 testified (1/20/2025–1/23/2025). **Exhibit 14** reflects costs totaling \$1,860.76; however,
24 consistent with Civil Local Rule 54-3(e), 28 U.S.C § 1821, and “the maximum per diem
25 allowance for federal government employees,” Form CAND 133, Intuitive seeks to recover
26 \$1,036.

27 16. Attached hereto as **Exhibit 15** is a true and correct copy of an invoice reflecting
28 subsistence costs, specifically lodging costs, incurred for witness Grant Duque for the night

1 before the first trial day on which he was reasonably anticipated to testify through the day he
2 testified (1/22/2025–1/23/2025). **Exhibit 15** reflects costs totaling \$597.89; however, consistent
3 with Civil Local Rule 54-3(e), 28 U.S.C § 1821, and “the maximum per diem allowance for
4 federal government employees,” Form CAND 133, Intuitive seeks to recover \$493.21.

5 17. Attached hereto as **Exhibit 16** is a true and correct copy of an invoice reflecting
6 subsistence costs, specifically lodging costs, incurred for expert witness Loren Smith for the
7 night leading into his first reasonably anticipated day of testimony through the night before the
8 day he testified (1/22/2025–1/23/2025). **Exhibit 16** reflects costs for this time period totaling
9 \$468.43.

10 18. Attached hereto as **Exhibit 17** is a true and correct copy of invoices reflecting
11 subsistence costs, specifically travel costs, incurred for expert witness Loren Smith. **Exhibit 17**
12 reflects first-class airfare costs totaling \$2,221.49; however, consistent with *Shum v. Intel Corp.*,
13 682 F.Supp.2d 992, 1002 (N.D. Cal. 2009), Intuitive seeks to recover only half of these costs,
14 \$1,110.75.

15
16 I declare under the penalty of perjury under the laws of the United States that the
17 foregoing is true and correct.

18
19
20 Dated: February 13, 2025

By: /s/ Paul D. Brachman

21 PAUL D. BRACHMAN
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FILER'S ATTESTATION

I, Kenneth A. Gallo, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that the signatory identified above has concurred in this filing.

Dated: February 13, 2025

By: /s/ Kenneth A. Gallo
Kenneth A. Gallo

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